IN THE

Supreme Court of the United States

MAY TERM, 1979

No. 78-1843

WALLACE J. SCHONWALD,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Cases Cited

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The respondent State of New Jersey respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Superior Court of New Jersey, Appellate Division's opinion in this case.

Opinions Below

The New Jersey Supreme Court's order denying petitioner's petition for certification is reported at —— N.J. ——, —— A.2d —— (March 13, 1979) and appears as peti-

tioner's appendix C, page 11. The order of the Superior Court of New Jersey, Appellate Division denying petitioner's motion for rehearing, not reported, appears as petitioner's appendix B, pages 9 to 10. The opinion of the Appellate Division, not reported, appears as petitioner's appendix A, pages 7 to 9. As to the issue raised in the instant petition, the Appellate Division summarily affirmed, pursuant to New Jersey Court Rule 2:11-3(e)(2). The Superior Court of New Jersey, Law Division, Morris County, did not issue a written opinion; its oral ruling with respect to the issue raised herein appears in the trial transcript of April 20, 1977 (2R20-1 to 21).*

Constitutional Provisions, Statutes and Rules Involved

United States Constitution, Amendment V

OF CRIMES AND INDICTMENTS

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject, for the same offense, to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be witness against himself; nor to be deprived of life, liberty or property, with due process of law, nor shall private property be taken for public use, without just compensation. [U.S. Const. amend. V]

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*1R refers to the record below, transcript April 19, 1977. 2R refers to the record below, transcript of April 20, 1977.

New Jersey Statutes Annotated 2A:85-1. Offenses indictable at common law and not otherwise covered, punishable as misdemeanors.

> Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute, are misdemeanors. [N.J. S.A. 2A:85-1 (West, 1969, page 7)]

New Jersey Statutes Annotated 2A:93-6. Giving or accepting bribes in connection with government work, service, etc.

> Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor. [N.J.S.A. 2A:93-6 (West, 1969, page 147)]

New Jersey Court Rule 2:11-3(e)(2). Opinion Judgment; Stay After Judgment; Affirmance without Opinion.

> *Criminal Appeals.* When in a criminal appeal the Appellate Division determines that some or all of the issues raised by the defendant are clearly without merit, the court may affirm by an opinion which, as to such issues, specifies them and quotes this rule and paragraph. [R. 2:11-3(e)(2) (Gann ed. 1979, page 343)]

Question Presented

It is the State's position that the facts of record do not permit formulation of the question as stated by petitioner and that this case presents no real question warranting review by this Court.

Statement of the Case

State Grand Jury Indictment No. SGJ-35-76-5, filed on August 19, 1976, charged petitioner Wallace J. Schonwald with misconduct in office, N.J.S.A. 2A:85-1 (Count One) and solicitation of a bribe, N.J.S.A. 2A:93-6 (Count Two). He was tried before the Honorable Charles M. Egan, Jr., Judge of the County Court (temporarily assigned to Superior Court), and a jury from April 18 through May 4, 1977 and was found guilty on both counts.

The State's proofs established that petitioner, a former New Jersey Department of Transportation official, solicited and received large sums of money from Louis C. Ripa, former president and major shareholder in Porter and Ripa Associates, an engineering, planning and architectural design firm which did extensive business with the Department of Transportation, in exchange for past, present and future favorable treatment promised by petitioner in his capacity within that department. The unsuccessful defense theory advanced by petitioner at trial was that he had been legitimately employed by Ripa and the Porter and Ripa firm and had earned the sums of money involved.

The State's evidence primarily consisted of testimony from Ripa, who following petitioner's initial demand for money reported the incident to the State Attorney General and assisted in the subsequent investigation, and tape

recordings of portions of the conversations between Ripa and petitioner on the five occasions they met from June 16 to July 15, 1976. At those meetings, petitioner pursued his solicitation demands, and Ripa actually delivered to him in compliance with those demands the sums of $3,500 on June 18 and $14,000 on July 15, 1976, using funds supplied by the State for this purpose. As petitioner left the July 15, 1976 meeting, he was stopped and detained by State agents who executed a previously obtained search warrant. Contradictory exculpatory statements made by petitioner during and following the search were also admitted into evidence by the State.

Pursuant to petitioner's motion to suppress these extrajudicial statements, a voluntariness (*Miranda*) hearing was held prior to trial at which time the following information was elicited from Deputy Attorney General Bozza, the sole witness. As petitioner drove from the Porter and Ripa parking lot on July 15, 1976 following his meeting with Ripa wherein he received a $4,000 check and $10,000 cash, his vehicle was followed by Detective Ottens and Bozza. By prearrangement, a uniformed trooper approached petitioner's vehicle as it stopped at a nearby traffic light and directed petitioner to the adjacent police barracks parking lot. Petitioner, followed by Bozza and Ottens, drove into the lot (1R46-16 to 48-15). Ottens made introductions and requested petitioner to accompany them inside, and petitioner agreed (1R49-3 to 18).

Inside, introductions were again made (including Deputy Attorney General Cox who had joined them), and a valid search warrant authorizing a search of petitioner's person and vehicle for the check and cash was produced and explained to him. He was told he would be detained for a short period pursuant to the warrant and that they would be looking for a $4,000 check and $10,000 in cash.

To this petitioner announced that he knew nothing about the cash and that he "had worked for" the check. He voluntarily produced the check (1R50-5 to 13). These remarks were not in response to questions, and petitioner was cautioned not to volunteer information (1R50-14 to 21).

Next, petitioner's person was searched, revealing nothing pertinent (1R50-25 to 51-13). Petitioner reiterated several times that he knew nothing of the $10,000, and he was repeatedly advised not to volunteer information (1R51-16 to 52-2). Thereafter everyone went outside where petitioner's vehicle was searched in his presence and the $10,000 was found (1R52-3 to 11).

Back inside, the money was counted and Bozza advised petitioner that in their opinion they "had enough" to arrest him for the commission of a crime but that he was *not* going to be arrested and the evidence would be presented to the Grand Jury. He was told "he was free to leave because the search had ended" (1R53-18 to 23). Petitioner was then told that Bozza wished to ask him questions, and he was advised that he did not have to answer questions, that if he did answer the questions anything he said could be used as evidence against him and that if he wanted to contact a lawyer and have the lawyer present during the course of the conversation he was free to do so (1R53-23 to 54-4). Since petitioner was not arrested and was free to leave at any time, he was not told that an attorney would be appointed for him if he were unable to afford one (1R54-22 to 55-13).

Thereupon petitioner was questioned. During the interview, he took alternative positions regarding the $10,000 and maintained that the $4,000 had been legitimately earned (See 1R56-10 to 23). Petitioner was told his stories were not believable, and portions of previously

taped conversations were played for him to demonstrate this. Several times Bozza attempted to terminate the interview. Despite this, petitioner insisted on staying and trying to exculpate himself (1R57-3 to 12). At the conclusion of the interview which lasted approximately one and a half hours, petitioner left unhindered and unarrested (1R59-10 to 23).

In denying petitioner's motion to suppress, the trial court ruled:

> [T]he totality of the circumstances here satisfies me as the finder of the fact for the purposes of this motion that Mr. Schonwald, first, was told not to volunteer any statements, secondly, he was told more than once that he was free to leave. In fact, he was almost advised or urged or begged to leave. I believe, as I already stated, that Mr. Bozza's terminology was something about practically chasing him out of headquarters.
>
> Finally, I have absolutely no reason in the world to believe that if Mr. Schonwald had said at the outset: You say I'm not under arrest, well, then, I'm getting out of here as fast as I can, no one would have stopped him from doing it.
>
> Under those circumstances, I cannot conclude that there was any violation of the defendant's rights by failing to give him the full *Miranda* warnings, and I'm satisfied that what he said was said voluntarily. (2R20-1 to 18).

Thereafter, petitioner was tried to a jury and convicted of misconduct in office and bribery solicitation. The judgment of conviction was entered on August 19, 1976, and petitioner was sentenced to concurrent two to

three year terms at the New Jersey State Prison and fined $2,000. The Superior Court of New Jersey, Appellate Division affirmed petitioner's conviction pursuant to New Jersey Court Rule 2:11-3(e)(2) on December 7, 1978, and denied his motion for rehearing on December 21, 1978. The New Jersey Supreme Court denied his petition for certification on March 13, 1979. Petitioner has been incarcerated pursuant to the instant sentence since April 4, 1979.

REASONS FOR DENYING CERTIORARI

POINT I

The facts of record do not permit the formulation or resolution of the question stated by petitioner.

The four-fold warnings enunciated in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), need only be administered to and waived by an individual when he is subjected to State initiated custodial interrogation. During the period while petitioner was detained so that the search warrant could be executed he was not subjected to any questioning and was repeatedly cautioned not to volunteer information whenever he gratuitously made a statement concerning the check or cash. *Miranda* warnings are not required where statements made are volunteered and do not result from police questioning or remarks. *Miranda* v. *Arizona*, 384 U.S. at 478, 86 S.Ct. at 1630, 16 L.Ed. 2d at 726; *State* v. *Slobodian*, 120 N.J. Super. 68, 74-75, 293 A.2d 399, 402-403 (App. Div. 1972), certif. den. 62 N.J. 77, 299 A.2d 75 (Sup. Ct. 1972), bail den. 409 U.S. 909, 93 S.Ct. 212, 34 L.Ed.2d 170 (1972). Even if such statements are made while the defendant is in custody, the *Miranda* rule is

not brought into play if the statements are unsolicited and not the result of any interrogation. *State* v. *Gallicchio*, 51 N.J. 313, 240 A.2d 166 (Sup. Ct. 1968), *cert.* den. 393 U.S. 912, 393 S.Ct. 233, 21 L.Ed.2d 198 (1968); *State* v. *Gosser*, 50 N.J. 438, 445-446, 236 A.2d 377, 381 (Sup. Ct. 1967), *cert.* den. 390 U.S. 1035, 88 S.Ct. 1434, 20 L.Ed.2d 295 (1968).

From the time the actual search was completed and the recovered money counted petitioner's presence at the police barracks was entirely voluntary. He was not under arrest or otherwise detained or deprived of his freedom, and he was free to go wherever and whenever he pleased. Compare with *Orozco* v. *Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969). The questioning of a suspect at a police station need not be preceded by the *Miranda* warnings so long as the suspect is not subjected to such a restriction of his freedom as to render him in custody. *Oregon* v. *Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). While some doubt exists as to precisely what circumstances short of an actual arrest will trigger the warning requirements of *Miranda*, *State* v. *Godfrey*, 131 N.J. Super. 168, 176, 329 A.2d 75, 79 (App. Div. 1974), aff'd o.b. 67 N.J. 267, 337 A.2d 371 (Sup. Ct. 1975), at the very least, the State must engage in such conduct as would lead the individual to reasonably believe that he is being significantly deprived of his freedom at the time of questioning. See *Iverson* v. *State of North Dakota*, 480 F.2d 414, 422-423 (8 Cir. 1973), *cert.* den. 414 U.S. 1044, 94 S.Ct. 549, 38 L.Ed.2d 335 (1973); *United States* v. *Hall*, 421 F.2d 540 (2 Cir. 1969), *cert.* den. 397 U.S. 990, 90 S.Ct. 1123, 25 L.Ed.2d 398 (1970). Petitioner, however, was specifically advised he was free to leave prior to being questioned, was specifically advised that he need not answer

questions, that his answers could be used against him and that he was entitled to secure an attorney and have him present during any questioning, and was practically forced to terminate the interview and leave the station. Under such circumstances it is manifest that petitioner's statements were not obtained in violation of the *Miranda* decision or his Fifth Amendment right against self-incrimination.

The facts of record, as determined by the trial court, do not permit formulation and resolution of the question stated by petitioner. Petitioner's unsolicited statements during the search were not the result of State questioning or interrogation within the meaning of *Miranda* v. *Arizona* and its progeny, and petitioner's responses to questions following the search were not obtained in a custodial situation within the meaning of *Miranda* v. *Arizona* and its progeny.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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